



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Petition for Review of  
Construction Permit No. 02-RV-032-R2 and  
Operation Permit No. 405031990-P20 issued to  
Wisconsin Public Service Corporation for the  
Pulliam Facility

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Case No.: IH-09-05

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Pursuant to due notice, hearing was held at Green Bay, Wisconsin on October 12-13, 2011, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to submit written closing arguments, and the last was received on October 28, 2011. The parties also filed e-mail correspondence on October 31, 2011, and on November 22, 2011, the ALJ denied a request to strike a partial transcript of the proceeding submitted by Wisconsin Public Service Corporation.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Public Service Corporation, by

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Department of Natural Resources, by

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## FINDINGS OF FACT

1. The Department of Natural Resources (DNR) issued air quality Construction Permit No. 02-RV-032-R2 and Operation Permit No. 405031990-P20 relating to the Wisconsin Public Service Commission Pulliam facility located at 1530 Bylsby Avenue, Green, Bay, Brown County, Wisconsin.
2. A verified Petition for Review of the permits was filed by Attorneys Linda Benfield and Brian H. Potts on behalf of the Wisconsin Public Service Corporation.
3. On July 20, 2009, the DNR filed a Request for Hearing with the Division of Hearings and Appeals regarding the issue of whether averaging periods for emission limitations should have been included in the permits.
4. The heart of the dispute between the parties relates to Wisconsin Public Service Commission's request to include a three hour averaging period for condition I.A.a.(1) in air pollution control Operation Permit No. 405031990-P20.
5. The challenged permit conditions are set forth in detail in Ex. 108. WPSC argues that the Permit limits at issue are vague and ambiguous because they lack averaging periods. They cite USEPA policy documents that have interpreted the Clean Air Act to require state air permitting agencies to include averaging periods in certain Title V emission limits.
6. WPSC's expert permit writer, Jon Perry, has written permits for coal-fired power plants in a number of states. Perry opined that the limits are ambiguous without averaging periods. Mr. Perry testified that some state agencies include averaging periods in emission limits, even where the underlying regulation lacks an averaging period. He also testified that these agencies do so because U.S. EPA has interpreted the Clean Air Act to require it. However, the evidentiary record is not at all clear on this point. The exhibits cited by WPSC include a Mississippi paper mill (Ex. 30), another mill in Florida (Ex.29), and a Florida power plant that burns a combination of fuel oil and coal that is subject to prevention of significant deterioration (PSD) permit requirements. (Ex. 35) None of these was a coal fired power plant under the same legal status as the Pulliam facility. Further, as DNR experts noted, several permits discussed in this case which were issued to coal- fired power plants (like the Pulliam facility) in nearby states did *not*

include averaging periods for similar emission limitations. (See: Ex. 24 Indiana, Ex. 26 Minnesota, and Ex. 221 Ohio) DNR permit expert Steve Dunn testified that the one Wisconsin air permit cited by WPSC which did include an averaging limit not specified in the underlying permitting regulation, the Appleton Coated plant, was not a coal-fired power plant. Further, both Mr. Dunn and his supervisor Mr. Stewart testified that that permit was issued in error and would be corrected when the opportunity arose.

7. Larry Hottenstein, an expert in the methods used to measure emissions from power plants, testified that there is no way to measure emissions from the plant on an instantaneous basis and, therefore, that the limits at issue must include averaging periods. Bradford Pyle—the Permit writer—testified both in his deposition and at the hearing with regard to lb/MMBtu limits that “[b]ased on the hourly capacity of the boiler and the limit, it would be an hourly limit.” (Hearing Ex. 45 at p. 31) However, the manner in which the Department interprets stack testing for compliance and enforcement purposes is not dispositive on the question of whether the DNR has authority to include averaging times in the permit itself. (Stewart and Dunn)

8. The DNR air permitting experts were convincing that the disputed permit condition comes directly from the binding administrative code language found in Wis. Admin. Code NR 415.06(1)(b). This provision does not allow for an averaging period. (Stewart, Dunn) Further, both Andrew Stewart and Steven Dunn testified persuasively that when an administrative code provision does not include a time element or a specific averaging period that the Department has consistently enforced the provision as being applicable to the regulated facility at all times. Stewart testified that the WDNR has issued more than 9000 construction and operation permits since the late 1980’s. Mr. Stewart testified that the DNR has consistently taken the position that it would not include an averaging period in a permit condition that was not included in the regulation which gave the Department its regulatory authority, such as the language found in Wis. Admin. Code NR 415.06(1)(b). The only times that the Department has included an averaging limit relate to case-by-case determinations under other regulatory frameworks, such as PSD or best available control technology reviews (BACT). There are also averaging times in air toxic reviews and under new source performance standards. (Stewart) Further, Stewart reviewed the history of USEPA approval of the Wisconsin regulation at issue in this proceeding, and the predecessor code provision of Wis. Admin. Code NR 415.06(1)(b) was approved no later than the late 1970’s. The USEPA approval does not give Wisconsin discretion to ignore the plain language of this code provision by including averaging periods when issuing air permits. (Stewart) The USEPA has never questioned Wisconsin’s practice of not including an averaging period under any Title 5 air permit issued pursuant to Wis. Admin. Code NR 415.06(1)(b) over the thirty year period that this regulation has been in force, despite repeated formal opportunities to do so. (Stewart)

9. WPSC made an effort to show that the administrative code as it currently exists does not comport with methods of stack testing that include some de facto averaging for certain emissions, notably particulates. (PM) They presented a table demonstrating that the DNR did not take enforcement action against several facilities

when one of three stack tests was higher than the facility's PM limit but two were in compliance. (Ex. 40) It should be noted that none of the cited stacked tests related to coal fired power plants located in the Lake Michigan Intrastate AQCR that were subject to the stricter emission limits of found in Wis. Admin. Code NR 415.06(1)(b) and this permit. (Ex.108) Further, there are several ways to determine compliance with particulate matter limits, and stack testing is just one way. It is also a very infrequent method—occurring once every two years or less often—whereas other methods are used on a much more frequent basis. The permit includes some methods, like monitoring parameters of Electric Static Precipitator (ESP) performance as a surrogate. (Ex. 107 § I.A.1.b.) There are also continuous emission monitors, using opacity as a surrogate, and other methods. WPSC witness Howard Giesler conceded that when he certifies compliance with particulate matter limits, under oath and penalty of law, he relies on methods other than, and in addition to, stack testing.

10. Andrew Stewart, DNR Chief of the Air Permit Stationary Source Modeling Section, testified at hearing that the air quality impact analysis is based on certain assumptions about maximum emission rates. Modeling is supposed to assume “worst case,” or maximum legal emissions. Where emissions can be averaged over time, maximum instantaneous emission rates can be much higher than the limit because spikes in emission rates can be diluted through averaging. Mr. Stewart opined that it would be “highly likely” that the ambient air quality standards would be exceeded if DNR were to include averaging periods in the Pulliam facility permit and to re-do the ambient air quality analysis accordingly.

11. For the reasons set forth above, it would not be appropriate to include averaging times in the permit shield section of the permit. (Stewart)

12. The permit holder has not carried its burden of demonstrating that the air quality permit should include averaging limits not specified by law in Construction Permit No. 02-RV-032-R2 and Operation Permit No. 405031990-P20 relating to the Wisconsin Public Service Commission for its Pulliam facility.

## DISCUSSION

The heart of the dispute between the parties relates to Wisconsin Public Service Commission's request to include a three hour averaging period for condition I.A.a.(1) in air pollution control Operation Permit No. 405031990-P20. However, the DNR experts were convincing that this permit condition comes directly from the administrative code language found in Wis. Admin. Code NR 415.06(1)(b). (Stewart, Dunn)

It is a longstanding principle of administrative law that a state agency has only those powers which are expressly granted to it by the legislature or reasonably implied as being necessary to execute the same. See: *American Brass Co. v. State Board of Health*, 245 Wis. 440, 15 N.W.2d 27 (1944). Neither the Department nor this ALJ have the discretion to simply ignore or re-write a properly promulgated administrative code

provision, as would be required to include averaging limits that are not included in the administrative code.

WPSC also made an effort to show that the administrative code as it currently exists does not comport with methods of stack testing that include averaging for certain emissions, notably particulates. However, they were not successful in establishing their main contention—that without supplementing the administrative code language to include averaging periods, that the permit conditions are vague or unenforceable. Rather, the Department established that the permit terms are clear and enforceable and are based upon the plain language of the administrative code. Further, including them now in either the main body of the permit or in the permit shield section of the permit, would render the earlier air quality modeling inapposite and make it “highly likely” that the ambient air quality standards would be exceeded if DNR were to include averaging periods and to re-do the ambient air quality analysis accordingly.

It should be noted that WPSC was provided every the opportunity to provide (apples-to apples) coal-fired power plant air permits from other states which would support its argument that averaging periods were necessary as a result of USEPA policies. However, as DNR noted, several permits discussed in this case which were issued to coal- fired power plants in nearby states with USEPA Region 5 did *not* include averaging periods for similar emission limitations. (See: Ex. 24 Indiana, Ex. 26 Minnesota, and Ex. 221 Ohio)

WPSC has not carried its burden of demonstrating that a three hour averaging period for condition I.A.a.(1) in air pollution control Operation Permit No. 405031990-P20 is necessary for the permit to be either enforceable or compliant with USEPA policy. Rather, the DNR established by a preponderance of the credible evidence that the existing permit conditions set forth in Ex. 108 are based upon the plain language of the administrative code, and have been approved for decades by the USEPA. Further, there was no dispute in the hearing record that it would be “highly likely” that the ambient air quality standards would be exceeded if DNR were to modify the permit to include averaging periods

Accordingly, the department’s action in this matter must be affirmed.

## CONCLUSIONS OF LAW

1. This hearing was a contested case under ch. 227. Following the hearing the department's action may be affirmed, modified or withdrawn. Wis. Stat. § 285.81

2. The department’s action in this matter is affirmed, because the permit holder has not shown that the department erred in not including averaging limits for the emission limitations set forth in Ex. 108. The disputed permit limits are not vague or ambiguous, but are enforceable and consistent with all previously issued WDNR air permits for coal-fired power plants. Further, the provisions in the permit that do not

include averaging limits are consistent with permit limits for coal fired power plants in other states in USEPA Region 5 and there has been no showing that the permit limitations at issue violate USEPA policy or practice.

3. WPSC has not demonstrated that amending the permit provisions to include averaging periods could be done without exceeding the ambient air quality standards set forth in Wis. Stat. Chapter 285.

4. The department's action in this matter was evaluated under §1.1 and Wis. Admin. Code NR 150, and does not require further environmental review under those provisions.

### ORDER

WHEREFORE IT IS HEREBY ORDERED, that the department's action in this matter be AFFIRMED for the reasons set forth above.

Dated at Madison, Wisconsin on December 7, 2011.

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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge

### NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.